

**STAFF DRAFT #4** (6.12.08)

June XX, 2008

**DRAFT UNOFFICIAL ADVISORY OPINION 08-XX**

Interpretation Tenn. Code Ann. §§ 3-6-305 with regard to whether any of the exceptions contained therein allow state officials subject to the Tennessee Ethics Reform Act to solicit contributions from employers of lobbyists on behalf of a state employee's organization.

Initial Requestor<sup>1</sup>: Gerry Boaz, Immediate Past President and Chapter Executive Committee member, Association of Government Accountants.

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**QUESTION**

If it is assumed the Tennessee Ethics Reform Act ("Act") gift ban<sup>2</sup> prohibits officials in the executive branch and officials in the legislative branch ("State Officials") from soliciting employers of lobbyists ("Employers") for contributions to the Association of Government Accountants ("AGA"), do any of the statutory exceptions to the general gift ban<sup>3</sup> allow for this conduct?

**ANSWER**

No. Assuming but not deciding<sup>4</sup> that the behavior is prohibited by the Act's gift ban,<sup>5</sup> none of the exceptions contained within Tenn. Code Ann. § 3-6-305(b) provide an exception allowing State Officials to solicit Employers for contributions to the AGA.

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<sup>1</sup> Mr. Boaz posited the question addressed in this opinion as part of a formal request for an Advisory Opinion which contained several questions. This opinion answers only the very narrow question below, and does so by making an assumption that the Act's gift ban generally applies to the conduct in question. Mr. Boaz did not make such an assumption.

<sup>2</sup> Tenn. Code Ann. § 3-6-305(a).

<sup>3</sup> Tenn. Code Ann. § 3-6-305(b).

<sup>4</sup> The commission has not decided the question whether the general gift ban prohibits a state official, acting in his capacity as a board member of the AGA, from soliciting contributions for the AGA from an employer.

<sup>5</sup> Tenn. Code Ann. § 3-6-305(a).

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### FACTS

The AGA is a national professional organization promoting government accountability, providing education, fostering professional development and providing certification. The AGA also supports standards and research to advance government accountability. The AGA's membership is comprised of government accountability professionals such as auditors, accountants, budget analysts, chief financial officers, information systems managers, finance directors, inspectors general, professors and students. Chapter Executive Committee members receive permission from their respective agencies to serve as such.

Most AGA chapters have fundraising activities. In 2006, AGA solicited funds from private businesses to sponsor the Southeastern Professional Development Conference, a regional event. The AGA plans to hold a conference in 2008. The AGA intends to solicit funds from businesses having previously sold goods and services to the State of Tennessee. The AGA wants to start a Corporate Sponsorship Committee to solicit contributions from local businesses to benefit all members of the AGA.

### ANALYSIS

Tenn. Code Ann. § 3-6-205(a)(1) prohibits gifts from Employers to State Officials.<sup>6</sup> Tenn. Code Ann. § 3-6-205(a)(2) provides State Officials may not *solicit* or accept gifts from Employers.<sup>7</sup> These two provisions are, together, called the gift ban. Exceptions to the gift ban are found in Tenn. Code Ann. § 3-6-205(b).

If one assumes the gift ban found in Tenn. Code Ann. § 3-6-205(a) does prohibit State Officials from *soliciting*<sup>8</sup> contributions from Employers on behalf of the AGA, no exceptions found within Tenn. Code Ann. § 3-6-205(b) apply to allow the conduct.

#### **Benefits from outside activities (Tenn. Code Ann. § 3-6-305(b)(1))**

Tenn. Code Ann. § 3-6-305(b)(1), provides an exception to the above-referenced gift ban for, “[b]enefits resulting from business, employment, or other outside activities of a candidate or official or the immediate family of a candidate or official, if such benefits are customarily provided to others in similar circumstances and are not enhanced due to the status of the candidate or official.”

Tenn. Code Ann. § 3-6-305(b)(1), then, would only allow a State Official to participate in the solicitation of Employers on behalf of the AGA if the right to solicit contributions were

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<sup>6</sup> Tenn. Code Ann. § 3-6-205(a)(1).

<sup>7</sup> Tenn. Code Ann. § 3-6-205(a)(2)(emphasis added).

<sup>8</sup> (emphasis added).

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viewed as a “benefit...customarily provided to others in similar circumstances...”<sup>9</sup> To view “soliciting”<sup>10</sup> as a “benefit,” would be an absurdity of syntax.<sup>11</sup>

Looking at the meaning of the words “benefit” and “solicit” one finds they are not the same.<sup>12</sup> “A benefit” is a noun and thus denotes an item or thing.<sup>13</sup> Merriam-Webster defines “a benefit” as an item “that promotes well-being” or a “useful aid” such as “financial help in time of sickness, old age, or unemployment” or “a payment or service provided for under an annuity, pension plan, or insurance policy.”<sup>14</sup> This definition makes sense as the Act talks about benefits as things of value that the Act contemplates being *provided to* State Officials.<sup>15</sup> “Solicit” is a verb and thus denotes an action or activity.<sup>16</sup> Merriam-Webster defines “solicit” as “to approach with a request or plea” or “to try to obtain by usually urgent requests or pleas.”<sup>17</sup> Thus, to solicit is distinct from the receiving a benefit.

That Tenn. Code Ann. § 3-6-305(b)(1) would not allow State Officials to solicit from Employers does not mean such officials cannot benefit from the results of solicitation performed by others, however.<sup>18</sup> The gift ban in the Act only applies to Officials in the Legislative Branch and Officials in the Executive Branch. The Act defines Officials in the Executive Branch as, in relevant part:

[T]he governor, any member of the governor's staff, any member or employee of a state regulatory commission, including, without limitation, directors of the Tennessee Regulatory Authority, or any member or employee of any executive department or agency or other state body in the executive branch.<sup>19</sup>

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<sup>9</sup> (emphasis added).

<sup>10</sup> While the Act uses the word “solicit,” it is necessary to conjugate this word in order to use it meaningfully within certain sentences, as “solicit” is a verb.

<sup>11</sup> *Wachovia Bank of North Carolina, N.A. v. Johnson*, 26 S.W.3d 621, 624 (Tenn. Ct. App. 2000)(courts should presume the legislature did not intend an absurd result).

<sup>12</sup> *State v. Blackstock*, 19 S.W.3d 200, 210 (Tenn.2000)(“[t]he legislative intent and purpose are to be ascertained primarily from the natural and ordinary meaning of the statutory language....”).

<sup>13</sup> <http://www.merriam-webster.com/dictionary/benefit> (last visited June 13, 2008).

<sup>14</sup> <http://www.merriam-webster.com/dictionary/benefit> (last visited June 13, 2008).

<sup>15</sup> Tenn. Code Ann. § 3-6-305(b)(1)(emphasis added).

<sup>16</sup> <http://www.merriam-webster.com/dictionary/solicit>.

<sup>17</sup> <http://www.merriam-webster.com/dictionary/solicit>.

<sup>18</sup> Tenn. Code Ann. § 3-6-305(b)(1) would only allow a State Official to participation in the solicitation of Employers if doing so were viewed as a “benefit” which is, “provided to others in similar circumstances and are not enhanced due to the status of the candidate or official.”

<sup>19</sup> Tenn. Code Ann. § 3-6-301(19).

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Likewise, the Act defines Officials in the Legislative Branch as, in relevant part:

[A]ny member, member-elect, any staff person or employee of the general assembly or any member of a commission established by and responsible to the general assembly or either house of the general assembly who takes legislative action. "Official in the legislative branch" also includes the secretary of state, treasurer, and comptroller of the treasury and any employee of those offices.<sup>20</sup>

The Act does not, then, prohibit all members of the AGA from soliciting employers. Some state employees, such as those employed by the judicial branch, for example, are not included in the ban. Thus, if an accountant employed by the Tennessee Court of Appeals was an AGA member and wished to solicit contributions from Employers on behalf of the AGA, the Act would not prohibit that activity.<sup>21</sup> Similarly, an AGA member who was an employee of a state other than Tennessee would in no way be subject to the Act. Such persons could obviously solicit Employers on behalf of the AGA even where State Officials cannot.

Membership in the AGA is an outside activity for State Officials. While AGA is an organization for government accountability officials, government accountability officials are not automatically AGA members. State Officials who are also government accountability officials may join the AGA and participate in its programs to foster education, professional development, and the advancement of government accountability. That these programs may be funded, in part, through the employer-solicitation activities of other AGA members not subject to the Act has no bearing on the ability of State Officials to participate in these outside activities.<sup>22</sup>

In other words, while the Act's restrictions always apply to State Officials, under Tenn. Code Ann. § 3-6-305(b)(1), State Officials who are also AGA members may receive the same AGA membership benefits as their colleagues, so long as the benefits are in no way enhanced due to the State Official's position as such.<sup>23</sup>

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<sup>20</sup> Tenn. Code Ann. § 3-6-301(20).

<sup>21</sup> That is not, of course, to say that a departmental ethics regulation would allow such behavior. Many departmental ethics rules might indeed prohibit such activity, even if allowed by the Act.

<sup>22</sup> The Act is Tennessee law of limited jurisdiction and can only regulate the conduct of State Officials. In this case, any monies solicited from Employers by persons not subject to the Act could only benefit State Officials as AGA benefits. In other words, the AGA would determine the benefit to members and how that benefit should be given. Unless the AGA noted where the monies came from, the State Official would not likely know the source of the benefit.

<sup>23</sup> This answer might also be applicable to part of Mr. Boaz' question eight (8):, "Are we state employees 24/7 for purposes of the Ethics Law when all members, not just me individually, benefits [sic] from the contributions?" If Mr. Boaz is asking the broader question of whether the Act's prohibitions vanish if all AGA members benefit from employer contributions, the answer would be no. Assuming, however, that Tenn. Code Ann. § 3-6-305(a)(2) prohibits solicitation by State Officials, and assuming Mr. Boaz is asking the narrower question of whether the AGA may distribute benefits to State Officials if all other AGA members receive the same benefit, the answer would be yes, so long as the benefit to State Officials was in no way enhanced due to the State Official's position.

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**Opportunities and benefits made available to all members of an appropriate class of the general public (Tenn. Code Ann. § 3-6-305(b)(6))**

Tenn. Code Ann. § 3-6-305(b)(6) provides an exception to the gift ban for, “[o]pportunities and benefits made available to all members of an appropriate class of the general public.”<sup>24</sup> Even if one ignores the argument above that solicitation is not a “benefit,” or if one considers solicitation an “opportunity,” Tenn. Code Ann. § 3-6-305(b)(6) would not provide an exception. AGA membership is not “available to all members of an appropriate class of the general public.”<sup>25</sup> Unlike many membership organizations, AGA membership is only open to state government employees and thus mainly to State Officials. There is no reason to read the Act to allow State Officials to comprise, “an appropriate class of the general public.” Such a reading would serve to undermine and invalidate the Act as it would allow Employers to directly give gifts to State Officials as an appropriate class of the general public. Courts must construe statutes “with the saving grace of common sense.”<sup>26</sup> The Commission must do the same.

**Other exceptions**

Subsection (b) lists twelve (12) exceptions, including informational materials in the form of books, articles, periodicals, other written materials, audiotapes, videotapes, or other forms of communication,<sup>27</sup> unsolicited tokens or awards of appreciation, honorary degrees, or bona fide awards in recognition of public service in the form of a plaque, trophy, desk item, wall memento and similar items; provided, that any such item shall not be in a form that can be readily converted to cash,<sup>28</sup> and contributions to a fund established and controlled by a 501(c)(3) corporation for the benefit of an extremely ill immediate family member of an employee who is included within the definition of an official in the executive branch.<sup>29</sup> None of these, on their face, would appear to have any application to the factual scenario presented by the request.

Donald J. Hall, Chair

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<sup>24</sup> Tenn. Code Ann. § 3-6-305(b)(6) then goes on to enumerate several non-exclusive examples of situations in which opportunities and benefits are made available to all members of an appropriate class of the general public. Those specific examples include, items such as prizes and awards for public contests, and benefits of participation in events held within the state and sponsored by, or for the benefit of, charitable organizations. In other words, all members of the public must be eligible to participate and receive the opportunities and benefits.

<sup>25</sup> Tenn. Code Ann. § 3-6-305(b)(1) provides an exception for benefits, “customarily provided to others in similar circumstances” and would thus allow benefits to persons who were not “an appropriate class of the general public” as required by Tenn. Code Ann. § 3-6-305(b)(6).

<sup>26</sup> *State ex rel. Maner v. Leech*, 588 S.W.2d 534, 540 (Tenn. 1979) (citations omitted) (discussing that a court must presume the legislature intended a statute to be constitutional).

<sup>27</sup> Tenn. Code Ann. § 3-6-305(b)(2).

<sup>28</sup> Tenn. Code Ann. § 3-6-305(b)(5).

<sup>29</sup> Tenn. Code Ann. § 3-6-305(b)(12).

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